In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES OF AMERICA, PETITIONER

v.

SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered in this case on March 17, 1967.

OPINIONS BELOW

The opinion of the Court of Claims (Pet. No. 221, App. B)[1] is not yet reported. The opinion of the Indian Claims Commission pertaining to the question

---

[1] "Pet. No. 221" refers to the petition for certiorari challenging the Court of Claims' judgment on other grounds filed by the Indian tribes on June 5, 1967. *The Iowa Tribe of the Iowa Reservation in Oklahoma, et al.* v. *United States*, No. 221, O.T. 1967. We are filing our brief in opposition to that petition simultaneously with this petition.

presented in this petition (App. A, *infra*, pp. 10-26) is reported at 6 Ind. Cl. Comm. 464.

JURISDICTION

The judgment of the Court of Claims was entered on March 17, 1967 (Pet. No. 221, App. B). On June 16, 1967, the Chief Justice extended the time of the United States for filing a petition for a writ of certiorari to and including August 14, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether Indian tribes, by mere occupancy, can acquire aboriginal title, compensable under the Indian Claims Commission Act, to public lands not used or occupied by them at the time the United States acquired sovereign and legal title.

STATUTE AND TREATIES INVOLVED

The pertinent provisions of Section 2 of the Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, and of the Treaties of August 4, 1824, 7 Stat. 229, 231, are printed App. B, *infra*, pp. 26-28.

STATEMENT

The Sac and Fox and Iowa tribes filed suit under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, to recover damages in respect of alleged unconscionable consideration paid them for lands in Missouri to which they claimed aboriginal, or Indian, title and which they ceded to the United

States under the Treaties of August 4, 1824, 7 Stat. 229 and 231. The Sac and Fox had received $27,799.61 for 1,241,700 acres to which the Commission found the tribe had such title, and the Iowa, $19,846.23 for 1,551,200 acres. The consideration was found unconscionable by the Commission, and the tribes were awarded the difference between the amounts paid and the fair market value of the lands in 1825 (the effective date of the treaties).[2] This resulted in a net award to the Sac and Fox of $965,560.39 and to the Iowa of $633,197.77.

Both tribes had claimed aboriginal title to greater areas based upon occupancy after 1803, the date of the Louisiana Purchase. The Commission had rejected these claims, stating (App. A, *infra*, pp. 36a-37a):

> * * * As we view the evidence in this case the 1803 date is critical to the issue of aboriginal title, since, in the absence of government recognition (which we have just rejected); these Indians were powerless to increase their aboriginal holdings after 1803. Therefore, each petitioner must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaties of cession in 1824.

The Court of Claims reversed the Commission on this point, stating (Pet. No. 221, App. B, p. 37a):

---

[2] The tribes sought a greater recovery under a different measure of damages which was rejected by the Commission and the Court of Claims and is the subject of the tribes' petition in No. 221.

> In refusing to consider the post 1803 evidence, the Commission appeared to have confused Indian title with sovereign or legal title, although there is a great difference between them. At any rate, the Commission took the position that once sovereign title attached to land, Indian title could not thereafter be established. We do not agree.

Accordingly, the case was remanded to consider evidence of occupancy of other land between 1803 and 1824.

REASONS FOR GRANTING THE WRIT

1. Under the Indian Claims Commission Act, an Indian tribe may show that the United States paid it an unconscionably low price for the lands ceded by it to the United States, and recover the difference between that amount and the true value of the lands at the time of cession. Determining what lands purportedly ceded were actually owned by the tribe is thus critical in all cases under the Act. Clearly, if the tribe occupied the lands continuously for a long period that began before the United States acquired sovereignty of the area in which the lands lie, the tribe had aboriginal, or Indian, title, compensable under the Act. The question we present is whether such compensable title can be acquired by occupation commencing after United States sovereignty attaches. Contrary to the Court of Claims in this case, we think not.

Aboriginal (or Indian) title is the outgrowth of a principle of international law developed by the

nations of Europe engaged in the discovery, conquest and settlement of the new world. It was early agreed that discovery vested in the discovering nation sovereign and legal title, with the exclusive right to acquire possession from the native inhabitants and to regulate relations between them and the new sovereign. However, this sovereign right did not wholly extinguish the possessory rights of the indigenous populace. As this Court stated in *Johnson* v. *McIntosh*, 8 Wheat. 543, 574 (emphasis added):

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to *retain possession* of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Again, in *Worcester* v. *Georgia*, 6 Pet. 515, 543-544, this Court spoke of protecting "the pre-existing rights of its ancient possessions" and "the rights of those already in possession."

This right to retain possession of land occupied at the time the new sovereignty attached is what is known as aboriginal, or Indian, title —a "title" that could not be transferred by the Indian to third parties, *Johnson* v. *McIntosh*, *supra*,

and that could be extinguished only by the new sovereign, not by third parties. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272; *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339. Being possessory, the right was obviously limited to the area used and occupied at the time of discovery or conquest. It was the "aboriginal possession," the "ancestral home," dating from "time immemorial."[3] It was never suggested that the right could be enlarged after discovery or conquest—that the Indians could acquire new aboriginal title from the sovereign.

The rule is no different when sovereign and legal title is obtained by purchase from another nation, rather than by discovery or conquest. *Holden* v. *Joy*, 17 Wall. 211, made plain that it was the land occupied by the Indians at the time of the Louisiana Purchase (also involved here) that was protected under the doctrine of aboriginal title. This Court stated (at p. 245, emphasis added):

> When the President took possession of the Territory the absolute fee-simple title and right of sovereignty and jurisdiction became vested in the United States as the successor of the original discoverer, subject only to the Indian title and right of occupancy as universally acknowledged by all the departments of our government throughout our history. All agree that this land *then*, and for many years thereafter, was occupied by the Osage Indians. * * *

---

[3] In addition to the cases cited above, see *Mitchel* v. *United States*, 9 Pet. 711; *Shoshone Indians* v. *United States*, 324 U.S. 335.

Hence, save for the area actually used and occupied by the Indians (or that held by grant from the prior sovereign) at the time of acquisition, complete fee simple legal and sovereign title vested in the United States, and the land became public domain subject to disposition by Congress only. The Indian Claims Commission has long held this view (*Red Lake Band, and Ottawa and Chippewa Indians, et al.* v. *United States*, 7 Ind. Cl. Comm. 576, 610; *Minnesota Chippewa Tribe* v. *United States*, 8 Ind. Cl. Comm. 781, 820; *Caddo Tribe* v. *United States*, 8 Ind. Cl. Comm. 354, 374; *Confederated Tribes of the Umatilla Indian Reservation* v. *United States*, 14 Ind. Cl. Comm. 14, 118, 119) and its opinion is entitled to deference.[4]

---

[4] The Court of Claims itself has previously recognized that public lands unoccupied by Indians belong exclusively to the United States. Thus, in *Quapaw Tribe of Indians* v. *United States*, 128 C. Cls. 45, 49, the court stated:

> Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land * * *.

Cramer v. *United States*, 261 U.S. 219, is not opposed. There, the United States in 1866 granted a tract of land to a railroad, excepting from the grant lands "* * * reserved * * * or otherwise disposed of." This Court held that the exception applied to lands occupied by Indians continuously since 1859. No issue of Indian title was involved. The Court held only that

The Court of Claims thought here that it was inconsistent to recognize that Indian title could be acquired during the period of French sovereignty, before 1803, but not against the United States, thereafter. In strict logic, perhaps, Indian title could be limited to those lands occupied by Indians at the time of the first European explorations. But this would be a very difficult rule to administer. It would place an impossible burden of proof on Indian claimants, and its application would depend on uncertain points of old foreign law relating to the recognition of aboriginal title. These practical considerations support a rule which looks to long-term Indian occupancy as of the date United States sovereignty attached—after which, it is plain, aboriginal title could not arise, and new occupation would hardly be from "time immemorial." Moreover, whatever the rule in other nations, it is well settled here that title to public domain may be obtained only by Act of Congress—and not by adverse possession. Cf. *Sioux Tribe* v. *United States*, 316 U.S. 317. Accordingly, mere occupancy by Indians cannot—as against the United States—create title for which compensation under the Indian Claims Commission Act is due.

2. The decision below, unless reversed, will have a significant impact on cases pending under the Indian Claims Commission Act, all of which are sub-

---

the government in making the grant had not intended to displace its Indian occupants, in view of the settled governmental policy of "inducing the Indian to forsake his wandering habits" (261 U.S. at 227).

ject to judicial review exclusively in the Court of Claims. We estimate that the resolution of the question we present here will affect some 130,000,000 acres in eight cases, involving a potential liability to the government of some $50,000,000 to $100,000,000. In addition, the ruling below will greatly complicate the trial of such cases and postpone their final disposition, contrary to congressional intent. Public Law 90-9, 90th Cong., 1st Sess., 81 Stat. 11. Finally, efforts to reopen closed cases on this new theory may be anticipated.

CONCLUSION

The Court of Claims has decided, we submit erroneously, a clear-cut legal issue of far-reaching importance to the administration of the Indian claims program. Accordingly, this petition should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

S. BILLINGSLEY HILL,
EDMUND B. CLARK,
Attorneys.

AUGUST 1967.

APPENDIX A

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 135

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA, et al., THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, THE SAC AND FOX TRIBE OF MISSOURI, AND SAC AND FOX TRIBE OF MISSISSIPPI IN IOWA, et al., PETITIONERS,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: July 2, 1958,

Appearances:

Elroy O. Jones and Brian Sullivan, Attorneys for Iowa Tribe, Kansas and Nebraska

Nicholas C. English and Godfrey K. Preiser, Jr., Attorneys for Iowa Tribe, Oklahoma

George B. Pletsch, Attorney for Sac and Fox Tribe, Oklahoma

Stanford Clinton, Attorney for Sac and Fox Tribe, Missouri

Lawrence C. Mills, Attorney for Sac and Fox of the Mississippi

Curtis C. Shears, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The petitioner, the Iowa Tribe or Nation of Indians and the member petitioners thereof, and the petitioner, the Sac and Fox Nation and the member petitioners thereof, seek additional compensation for their interests in those lands which each petitioner ceded to the defendant, United States, under separate but substantially identical treaties. Both treaties were concluded on August 4, 1824 in the City of Washington, D. C., and under each treaty the defendant took a cession with one exception of all the right, title, and interest of the respective petitioners to the same lands located in north central and northeastern Missouri. (7 Stat. 229, 231) Officially these lands are designated Royce 69 and 120, a more complete description of which is set out in Commission's Finding 4.

The exception referred to above is found in that treaty concluded with the Sac and Fox Nation (7 Stat. 229), whereby the United States reserved to the Sac and Fox Nation for the use and benefit of the Sac and Fox half-breeds the entire area included within Cession 120. This relatively small area is generally referred to as the "Half-breed" tract, and will be discussed in more detail in disposing of the petitioner Sac and Fox claims.

Of prime concern at this stage of the hearing are the respective claims of the petitioners that each had perfected aboriginal Indian title and/or recognized title to all the lands involved herein, or at least to defined portions thereof. The capacity of each of the petitioner claimants is also in issue. The Commission looks upon the petition filed herein as one stating

separate and distinct claims, since the petitioner's predecessors ceded their lands under separate treaties, and each petitioner has chosen to establish its title to separate portions thereof.

We shall first consider the claims of recognized title, noting that each petitioner bases his claim on a different theory.

Prior decisions of the courts and this Commission have established the principle that Congress is the sole source of "recognized" or reservation title, so that when Congress acts whether by treaty, statute or agreement, it accords legal rights to those Indians who previously held their lands under permissive occupation. (*Tee-Hit-Ton Indians of Alaska* v. *United States*, 348 U.S. 272; *Hynes* v. *Grimes Packing Company*, 337 U.S. 86; *The Miami Tribe, et al.* v. *United States* 5 Ind. Cls. Comm. 180)

Since recognized or reservation title is a legislative product, the answer to the present question calls for a legal determination as contrasted with proof of aboriginal title which involves primarily a question of fact. In any event, should petitioners' claims of recognition prevail, it would dispose of the present controversy over title and dispense with the question of aboriginal use and occupancy.

The Commission has thoroughly considered the respective claims of recognized title as ably presented by the Iowa and Sac and Fox petitioners, and finds them to be without merit.

Briefly, the petitioner Iowa argues that by virtue of certain language in the Prairie du Chien Treaty of 1825 (7 Stat. 272) in which the Sac and Fox Indians agreed that the "Ioways" would "have a just claim to a portion of the country between the boundary line, described in the next preceding article, and

the Missouri and Mississippi . . . ." and ". . . . the United States agree to and recognize the preceding boundaries . . . .", the United States recognized title to be jointly in the Sac and Fox and Iowa Indians to the entire area lying south of the "Sioux and Sac and Fox" line between the Missouri and Mississippi Rivers, which includes the area designated as Cession 69.

This argument, of course, ignores the plain fact that the Iowa petitioner had already ceded any interest it had in Cession 69 one year before the Prairie du Chien Treaty, and that the stated purpose of the Prairie du Chien Treaty of 1825 called for the establishment of distinct tribal boundaries upon unceded Indian lands. In this connection the two treaty Commissioners, Lewis Cass and William Clark, in a letter to the Secretary of War, dated September 1, 1825, stated:

> "We had nothing to ask of them . . . . neither the confirmation of old or the grant of new cessions. . . ." (Sac and Fox Ex. 104)

Of interest in connection with the Prairie du Chien Treaty of 1825 is an excerpt from the records of the Bureau of Indian Affairs dated January 9, 1837, which indicates that the Government viewed the joint Iowa-Sac and Fox claim under the 3rd Article of the treaty extended southward between the Missouri and Mississippi Rivers to the Missouri state line which coincides with the north boundary line of Cession 69.

This excerpt reads in part:

> "The Sac and Fox are one nation and jointly with the Ioways, claim an interest in the lands north of the State of Missouri . . . . The claim

> of the Ioways to a portion of this tract was admitted by the Sacs and Foxes in the 3rd Article of the treaty with them and other tribes of the 19th of August 1825 . . ." (Iowa Ex. 127)

Later, in 1842, T. Hartley Crawford, Commissioner of Indian Affairs, stated unequivocally in discussing the Prairie du Chien Treaty of 1825.

> "This treaty attached ownership of the Sacs and Foxes and Ioways to all the land south of the line fixed by the treaty of 1825 between the Sioux and Sacs and Foxes, *North of the Northern boundary of the State of Missouri as that line then existed,* and between the Mississippi and Missouri rivers." (Underscoring supplied) (Sac and Fox Ex. 121)

Also of interest is a letter of April 12, 1834 from Andre Hughes to Lewis Cass in which he states:

> "The Ioways, Sacs and Foxes of the Missouri river desire to cede to the United States a large tract of land lying west of the river Desmoines and north of and adjoining the State of Missouri . . . ." (Iowa Ex. 119)

In order to sustain the petitioner's Iowa claim of recognition it is necessary to declare null and void the Iowa Treaty of 1824, and thus effectively erase the boundary lines describing the ceded area therein. This we are not disposed to do in the absence of strong definitive language in the Prairie du Chien Treaty, or any other treaty or statute, which would point us in that direction. In fact the Prairie du Chien Treaty of 1825 makes no mention or reference to the Iowa Treaty of 1824.

The petitioner Sac and Fox Nation seeks to impress a reservation title upon the ceded lands involved in this proceeding by virtue of the language contained in the opening statement in Article 2 of the Sac and Fox Treaty of 1804 (7 Stat. 84) which reads:

> "The general boundary line between the lands of the said Indian tribes (Sac and Fox) shall be as follows: . . . ."

There then follows a description setting out the boundaries of the ceded area. The petitioner Sac and Fox alleges that by implication this language constitutes a recognition by the United States that title to the unlimited area lying outside and adjacent to the ceded portion rests in the Sac and Fox Nation.

Generally speaking, we know that the setting of boundary lines in a treaty of cession is somewhat arbitrary. The Government's main concern in establishing these lines is to be doubly sure that every conceivable claim asserted by the Indians, regardless of merit, is included within the ceded area; so that it is quite immaterial what portion of the ceded area the Indians may have exclusively occupied and controlled as long as it passes under the terms of the treaty.

What the petitioner Sac and Fox Nation is now urging upon us is nothing more than the converse of the old recognition argument advanced and rejected by the Commission in case of *The Quapaw Tribe of Indians, et al.* v. *United States*, (1 Ind. Cls. Comm. 409). In that case the Quapaw unsuccessfully argued that the setting of boundary lines in a treaty of cession is recognition by the United States of the Indian's title to the ceded area.

The Commission therefore rejects as untenable the petitioner's Sac and Fox claim of recognition to Cession 69 or any portion thereof and concludes that there is no language in the Sac and Fox Treaty of 1804, or any other treaty or statute, which would demonstrate a Congressional intent to award to the Sacs and Foxes in 1804 a greater interest in their unceded lands than in those lands which passed under the treaty of cession.

Before turning our attention to those claims founded upon aboriginal use and occupancy, this comment may be in order. By virtue of the Louisiana Purchase of April 30, 1803 (8 Stat. 200), the United States acquired from France, subject to the present Indian right of occupancy, a vast expanse of territory which includes the lands in controversy. The bulk of evidence introduced by the petitioners in support of their claim of title cites events occurring just prior to and subsequent to the 1803 date. As we view the evidence in this case, the 1803 date is critical to the issue of aboriginal title, since, in the absence of government recognition (which we have just rejected), these Indians were powerless to increase their aboriginal holdings after 1803. Therefore, each petitioner must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaties of cession in 1824.

The petitioner, the Iowa Nation of Indians, comprises two tribes, petitioner, Iowa Tribe of the Iowa Reservation in Kansas and Nebraska and the petitioner, Iowa Tribe of the Iowa Reservation in Oklahoma. Each of these tribes is an identifiable group of Indians residing within the territorial limits of the United States, and both are the successors in

interest to Iowa Nation of Indians which participated in the Iowa Treaty of August 4, 1824, and as such are entitled to institute the present action against the United States for and on behalf of the Iowa Nation of Indians and all its members pursuant to the provisions of the Indian Claims Commission Act. (60 Stat. 1049)

The Iowa Nation of Indians, one of the "Chiwere" groups of the Sioux linguistic stock with a close affinity to the Oto and Missouri Indians originally came from east of the Mississippi. Early reports place the Iowa in the late seventeenth century around the Lake Okeboji region in Northwestern Iowa and southwestern Minnesota. Sometime around the middle of the eighteenth century they departed this area and moved in a southerly direction down the Missouri River into the southwestern part of Iowa where they established a village just south of the present city of Council Bluffs, Iowa. From this village site, which is located northwest of Cession 69, the Iowa hunted the area southward along the Missouri River and east toward the western boundary of Cession 69. During this period this same area, which for the most part lies west and north of Cession 69, was utilized for hunting purposes by other Indian tribes such as the Omaha or Mahas, the Otoes and Missouris.

Sometime between 1755 and 1765 the Iowa Nation abandoned the village site at Council Bluffs, and moved slowly eastward across the southern part of Iowa to the Mississippi River, where eventually it chose to settle at a more permanent village site on the Des Moines River approximately 120 miles from the mouth of the Des Moines. This village lying north of Cession 69 is the best documented of all the Iowa village locations and the one which remained

a principal Iowa village site during the years that followed until about 1823.

Two principal factors are attributed to the general exodus of the Iowa Nation from the Council Bluffs area. In the first place, the Iowas were being constantly harassed by their inveterate enemies from the north, the war-like Sioux, who were pressing from the northern plains and conducting extended forays into the western part of Iowa. Of greater moment was the fact that the Iowas desired closer contact with their Spanish and French traders whose operations were centered primarily in St. Louis. With the rapid growth of Indian trading activity, those tribes, including the Iowas, who inhabited this region became more dependent for the simple necessities of life upon what they could barter with furs and skins. Thus, the period throughout the latter part of the 1700's and into the nineteenth century was marked by an awesome exploitation of many choice hunting grounds coupled with bloody and indecisive fights among competing tribes in search for new and more fertile hunting spots.

Having adapted themselves to the use of the horse, the Iowas hunted extensively west and southwest of their Des Moines River location across the southern part of Iowa to the Missouri and down into their old Council Bluffs hunting grounds, and in the plains between the Grand and Chariton Rivers toward their headwaters. These hunting forays frequently carried them into the northwestern portions of Cession 69. They continued to hunt in this area into the 1800's even after the United States acquired title to the entire area in the Louisiana Purchase of 1803. However, the bulk of Iowa hunting activity during this period was north and west of Cession 69, principally in the southern and southwestern part of Iowa.

At the outbreak of the War of 1812 with Great Britain, the United States, through the offices of William Clark, Governor of this territory, invited the Iowas, as well as the Sac and Fox Indians, to leave their Mississippi and Des Moines River sites, and travel south and west across to the Missouri River. The obvious purpose of Clark's move was to place these Indians outside of the scope of British influence and separate them from their pro-English brethern. Shortly thereafter, the Iowas temporarily removed from their Des Moines River site and filtered down to the south and southwest toward the Missouri River. Thus, we begin to find first reference to new Iowa village locations principally on the Grand River within Cession 69. The first of these apparently was established, but only temporarily, in 1816, its exact whereabouts being unknown. Other members of the Iowa nation moved across to the Missouri where they joined with the Otoes and the Missouris. With the influx of these Indians into Cession 69, there developed agitation and hostility between the red men and the white settlers who were spotted along both sides of the Missouri River west of the Mississippi. Roving bands of Iowas and Sac and Fox found occasion to renew hostilities with the Osage. It was not until after the War of 1812 that the Iowas, who were now greatly divided, began to reassemble as a nation. Around 1820 they were reported back at their old Des Moines River site but then abandoned it and built a new village on the Grand River in 1823 where the whole nation was reported to be living at one time. After negotiating the Treaty of August 4, 1824, the Iowas remained within Cession 69 only a short period and in 1827 they finally moved to a new village site on the Little Platte River, west of Cession 69. Throughout the

period of their known history, the estimated population of the Iowa Nation rarely exceeded 1,000 persons.

Considering the resume of the Iowa History and movement during the critical period in this case as set out above and as supported in more detail by the Commission's Findings 7 thru 14, we find that the evidence in this case does not justify the extent of petitioner's Iowa claim to those lands situated in the western half of Cession 69. Instead, we find that at the time the United States acquired the area in controversy in the Louisiana Purchase of 1803 and up to the time of the Iowa Treaty of August 4, 1824, the Iowa Nation held a good Indian title to those lands situated in the northwestern portion of Cession 69 as described in the Commission's Finding 15.

The petitioner, Sac and Fox Nation, or Confederated Sac and Fox, is composed of three tribes or bands who are petitioners herein. They are, the Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri, and the Sac and Fox Tribe of Mississippi in Iowa. Each petitioner tribe or band is adequately represented by individual member petitioners and each tribe or band is an identifiable group of Indians living within the territorial limits of the United States, and all are the successors in interest to all the tribes and groups of the Confederated Sac and Fox who participated in the Sac and Fox Treaty of August 4, 1824, and, as such, are entitled to maintain this present action against the United States for and on behalf of the Sac and Fox Nation or Confederated Sac and Fox and all its members, pursuant to the provisions of the Indian Claims Commission Act. (60 Stat. 959)

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians be-

longing to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with the other Indian tribes and in treaty negotiations and other matters with the United States.

It was shortly after this merger that the members of the Sac and Fox Nation began to establish themselves in Iowa. They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Des Moines River in Cession 120. For the most part the Fox Indians occupied the upper villages and the Sac Indians the lower villages, including the small village near the mouth of the Des Moines River. The principal Sac and Fox village sites during this period were located on the Rock River which is considerably north of the lands in controversy. Auguste Chouteau places the establishment of the Rock River location as 1764, while first references to the Sac village on the Des Moines River occur around 1780. All of these village sites are confirmed in subsequent reports, and in 1810 Debulon Pike sets them out specifically in a report on his 1805 Mississippi River expedition. (See Commission's Finding 19)

During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegiance to the cause of the United States departed their Mississippi River villages, and began to move down into Cession 69. There, during the years that followed, they were located at various places, and at

times in the company of the Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers. Best estimates as to the termination date of the Sac Des Moines River village fall within the period of 1821 to 1833, when after abandoning this location, the Sacs resettled on the Iowa River.

Having established their villages on the Mississippi around 1760, the Sac and Fox began to hunt the adjacent area on both sides of the river from as far north as Prairie du Chien to as far south as the mouth of the Illinois River. The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines River to the Missouri River, and includes generally the northeastern part of Cession 69 and all of Cession 50. Cession 50 lies immediately east of Cession 69 and west of the Mississippi, and embraces all those lands which were ceded to the United States by the Sac and Fox Treaty of 1804 (7 Stat. 84). The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810. Black Hawk, the intrepid Sac and Fox warrior, was quite specific in stating that the "Two River" country during this period was the choice hunting ground of his people. This reference points to the northeastern part of Cession 69.

During the entire period in which the Sac and Fox inhabited this Mississippi River area, they found themselves involved in perpetual warfare with their Osage neighbors from the South, who had their villages just below the Missouri River outside of Cession 69. Black Hawk, in his biography, speaks of his many engagements with the Osages who were a constant threat to the Sac and Fox hunting

grounds. This habitual agitation and fighting between these two nations created a veritable "no man's" land of southeast Cession 69 and the southern portion of Cession 50 until at least 1808, when the Osage Nation by treaty ceded to the United States all its right, title, and interest to those lands north of the Missouri River (7 Stat. 107).

After 1810 the Sac and Fox hunting grounds adjacent to the Mississippi River became so depleted that the quest for new and more productive areas compelled these Indians to extend their hunting expeditions over great distances west and northwest to the headwaters of the Grand and Chariton Rivers, and even further north to the headwaters of the Des Moines and Iowa Rivers. Because of the hazards and hardships involved, many of these Indians, particularly the Foxes, abandoned these long treks and concentrated on mining lead at their mines near Dubuque, Iowa.

In the years that followed the close of the War of 1812, and up until the Sac and Fox Treaty of 1824, this Nation can only be pictured as a wandering nomadic group, scattered in all directions, and challenging the other Missouri River Indians for control of the few remaining hunting areas near the Missouri River and its northern tributaries.

During the period in question, the best population estimates of the combined Sac and Fox tribes range between 4,400 and 6,500 persons.

The Commission therefore concludes from all the evidence and the facts as set out in the Commission's Findings 18 thru 22, that, at the time the United States acquired the area in controversy by virtue of the Louisiana Purchase of 1803, and up to the time of the Sac and Fox Treaty of 1824, the Sac and Fox Nation held Indian title to those lands situated in

the northeastern part of Cession 69 as described in the Commission's Finding 23.

Finally, we shall dispose of the title question surrounding Cession 120, the aforementioned "Half-breed" tract. While the petitioner, Iowa Nation, disclaims any interest concerning Indian title to these lands, the petitioner, Sac and Fox, is asking this Commission to treat these lands as part and parcel of Cession 69 insofar as determining the question of title. We feel, however, that in accord with the plain and unequivocal language of the Sac and Fox Treaty of 1824 coupled with subsequent Congressional action, the question of Indian title has been determined. (Commission's Finding 24)

Under the terms of the Treaty of 1824 a reservation was given outright to the Sac and Fox half-breeds; and this reserve was never ceded back or purchased by the United States, although requested to do so by the Sac and Fox. Instead, Congress by the Act of June 30, 1834, released its reversionary interest therein to the Sac and Fox half-breeds, granting them the full power and authority to transfer and convey a full fee. Petitioner, Sac and Fox, would now challenge the defendant's motive in setting up this particular reservation, but this in no way attacks the authority and power of Congress to act in this regard in the manner it chose.

On the proofs before us the Commission finds no basis upon which to attach either legal or moral liability to the defendant, if we deal with Cession 120 as we would in the ordinary title case involving lands ceded to the United States. However, we shall reserve final judgment in the matter of Cession 120 and afford an opportunity to the petitioner Sac and Fox, if it so desires, to present any additional evidence, covering the period of 1824 to 1834, which

would demonstrate to the satisfaction of the Commission that the defendant's conduct relative to the "Half-breed" tract worked such an injustice or injured the petitioner Sac and Fox in such a way as would oblige and compel the defendant to respond in measurable damages under the provisions of the Indian Claims Commission Act.

Having determined the question of title in favor of the petitioners to those portions of Cession 69 as set out in the Commission's Findings No. 13 and No. 21, we shall in like fashion reserve judgment on the question of defendant's liability until proof has been offered on the questions of the consideration paid to the Indians for the ceded lands, the total acreage, and the value at the time title thereto passed to the defendant.

We note that the lands described in Findings Nos. 15 and 23 herein are within the area claimed by the Osage Nation of Indians in Docket No. 105, now pending before the Commission, and for which the Osage are claiming additional compensation for lands including those described in Findings 15 and 23. No request for consolidation for trial, because of the conflict of interests, has been made by any party to the claims set forth in Docket No. 135 or Docket No. 105. It may, therefore, be necessary to withhold the final determination in Docket No. 135 until the claim of the Osage is determined.

s/ Edgar E. Witt
Chief Commissioner

We Concur:

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner

APPENDIX B

STATUTE AND TREATIES INVOLVED

Section 2 of the Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, provides in part:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

The Treaty of August 4, 1824, with the Sock and Fox Indians, 7 Stat. 229, provides in pertinent part:

> Article 1st. The Sock and Fox tribes or nations of Indians, by their deputations in council assembled, do hereby agree, in consideration of certain sums of money, &c. to be paid to the said Sock and Fox tribes, by the Government of the United States, as hereinafter stipulated, to cede and for ever quit claim, and do, in behalf of their said tribes or nations, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim to the lands which the said Sock and Fox tribes have, or claim, within the limits of the state of Missouri, which are situated, lying, and being, between the Mississippi and Missouri rivers, and a line running from the Missouri, at the entrance of Kansas river, north one hundred miles to the Northwest corner of the state of Missouri, and from thence east to the Mississippi. It being understood, that the small tract of land lying between the rivers Desmoin and the Mississippi, and the section of the above line between the Mississippi and the Desmoin, is intended for the use of the half-breeds belonging to the Sock and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held.

The Treaty of August 4, 1824, with the Ioway Tribe or Nation of Indians, 7 Stat. 231, provides in pertinent part:

> Article 1st. The Ioway Tribe or Nation of Indians, by their deputies, Ma-hos-kah, (or White Cloud,) and Mah-ne-hah-nah, (or Great

Walker,) in Council assembled, do hereby agree, in consideration of a certain sum of money, &c. to be paid to the said Ioway Tribe, by the government of the United States, as hereinafter stipulated, to cede and forever, quit claim, and do, in behalf of their said Tribe, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands which the said Ioway tribe have, or claim, within the State of Missouri, and situated between the Mississippi and Missouri rivers and a line running from the Missouri, at the mouth or entrance of Kanzas river, north one hundred miles, to the northwest corner of the limits of the state of Missouri, and, from thence, east to the Mississippi.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 271729 98